

## BYU Law Review

---

Volume 2002 | Issue 4

Article 4

---

11-1-2002

# Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in *Bonneville International Corp. v. Peters*

Edward L. Carter

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [First Amendment Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Edward L. Carter, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in Bonneville International Corp. v. Peters*, 2002 BYU L. Rev. 1155 (2002).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2002/iss4/4>

This Note is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

Promoting Progress or Rewarding Authors?  
Copyright Law and Free Speech in  
*Bonneville International Corp. v. Peters*

I. INTRODUCTION

As a broadcast medium, radio traditionally has been subject to government regulation that would be prohibited by the First Amendment if applied to other speakers.<sup>1</sup> Although the factors that justify speech-infringing regulation of radio broadcasters “are not present in cyberspace,”<sup>2</sup> delivery of radio content on the Internet was met almost immediately with government regulation that threatened its existence.<sup>3</sup> In mid-2001, Judge Berle Schiller of the Eastern District of Pennsylvania ordered Salt Lake City’s KSL 1160 AM and other stations around the country to pay millions of dollars in royalties to record companies for the privilege of continuing to make radio broadcasts available over the Internet.<sup>4</sup> *Bonneville International Corp. v. Peters*<sup>5</sup> represents the viewpoint of a single federal district court judge, but the decision has been widely noted by scholars as groundbreaking.<sup>6</sup> *Bonneville* is important because it addresses the

---

1. See *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (finding that “special justifications for regulation of the broadcast media” include the long history of government regulation of broadcasters, the scarcity of broadcast frequencies, and the invasive nature of broadcasting).

2. *Id.*

3. See Vince Horiuchi, *Ruling Makes Simulcasting Music on Internet Pricier for Stations*, SALT LAKE TRIB., Aug. 3, 2001, at A1 (noting that government regulation requiring payment of licensing fees for digital broadcasts of sound recordings forced radio stations across the country to discontinue online broadcasts); Ronna Abramson, *Court Deals Webcasters a Royal(ty) Blow*, INDUSTRY STANDARD, Aug. 2, 2001 (reporting that “[m]any radio broadcasters removed their Webcasts after” the U.S. Copyright Office ruled that broadcasters of digital sound recordings had to pay royalties to record companies), at <http://www.thestandard.com/article/0,1902,28450,00.html>.

4. *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001).

5. *Id.*

6. See, e.g., David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works Via the Internet, Music and More*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 235, 253 n.101 (2001) (taking note of Judge Schiller’s decision and its approval of a U.S. Copyright Office rulemaking that had been rendered “with perhaps questionable authority”); Raffi Zerounian, *Bonneville International v. Peters*, 17 BERKELEY TECH. L.J. 47, 47 (2002) (“[T]he district court allowed the Copyright Office to make a decision

extent of the right to public digital performance of a sound recording in the area of broadcast radio on the Internet.<sup>7</sup>

The district court's reasoning in *Bonneville* suffers two primary flaws that undercut the constitutional purpose of copyright law and raise questions about abridgement of speech. First, the trial court failed to give effect to congressional intent regarding the right to digitally perform sound recordings. Second, the court made an unsupported empirical assumption about potential economic harm of online radio broadcasts. The *Bonneville* case illustrates the potential for courts blinded by technology and globalization to transform copyright law from a society-based system aiming to promote scientific and artistic progress into an individual-based, moral-rights system aiming to compensate authors. *Bonneville* also illustrates that courts interpreting copyright law without considering the policies behind the Speech Clause of the First Amendment may unnecessarily restrict speech by limiting public access to information.

This Note begins by discussing the purpose of U.S. copyright law and the effects of globalization and technology on the Copyright Act during the twentieth century. Part III describes the factual and procedural aspects of *Bonneville* as well as the reasoning of the Eastern District of Pennsylvania in that case. Part IV discusses the interplay between copyright and free speech by first evaluating the *Bonneville* court's interpretation of the Copyright Act and then examining what First Amendment policies add to the adjudication of copyright law questions. Part V offers a brief conclusion.

## II. BACKGROUND

When Congress adopted the first Copyright Act in 1790, the rights of authors clearly gave way to the desire of the Framers to prevent "the evil of state-sanctioned monopoly."<sup>8</sup> In the first decade of U.S. copyright law, only five percent of the books published received copyright protection; copyrighted works joined the more numerous uncopyrighted works in the public domain after just

---

unprecedented in its history."). See generally Joshua P. Binder, *Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, but Who Gets Paid?*, 22 LOY. L.A. ENT. L. REV. 1 (2001) (discussing the ramifications of *Bonneville* for compensation of sound recording copyright owners).

7. See Zerounian, *supra* note 6, at 47.

8. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1062 (2001).

fourteen years.<sup>9</sup> Today's Copyright Act hardly resembles the 1790 statute: registration is no longer required so virtually every creative work imaginable is automatically copyrighted as long as it meets the low thresholds of originality<sup>10</sup> and fixation.<sup>11</sup> For works created after January 1, 1978, copyright endures for the life of the author plus seventy years.<sup>12</sup>

Copyright law encompasses not facts or ideas, but an author's expression in literary, musical, dramatic, filmed, recorded, and other formats.<sup>13</sup> Among six exclusive rights<sup>14</sup> spelled out in the Copyright Act, this Note discusses the right of public digital performance of a sound recording. Congress created this narrow public performance right in the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")<sup>15</sup> and modified it in the Digital Millennium Copyright Act of 1998 ("DMCA").<sup>16</sup>

#### *A. Constitutional Purpose of Copyright Law*

The constitutional Copyright Clause gives Congress power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>17</sup> Critical to an understanding of copyrights is the fact that the Framers not only granted Congress the power to allow copyrights but also specified a purpose—to promote scientific and artistic progress—and the means to

---

9. *Id.* at 1061.

10. *See* 17 U.S.C. § 102(a) (2000). Originality does not necessarily require artistic value or even novelty, "only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

11. A work is "fixed," under the statutory definition, "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (2000).

12. *Id.* § 302(a) (2000).

13. *See id.* § 102(a).

14. The rights are reproduction, preparation of derivative works, public distribution, public performance, public display, and public digital performance of a sound recording. *See id.* § 106.

15. Pub. L. No. 104-39, 109 Stat. 336.

16. Pub. L. No. 105-304, 112 Stat. 2860.

17. U.S. CONST. art. I, § 8, cl. 8.

accomplish that purpose, “by granting, not to publishers, but to authors, ‘exclusive Right[s]’ ‘for limited Times.’”<sup>18</sup>

In their struggle to “make[] reward to the owner a secondary consideration”<sup>19</sup> while still guaranteeing “valuable, enforceable rights”<sup>20</sup> sufficient to encourage scientific and artistic progress, U.S. courts have given substantial consideration to economic factors<sup>21</sup> while repeating standard explanations for not subjecting copyright law to scrutiny under the Speech Clause of the First Amendment.<sup>22</sup> Concerns about copyright law’s effect on speech freedoms traditionally have been met with the argument that copyright law internally accounts for the First Amendment through the idea-expression dichotomy,<sup>23</sup> the doctrine of fair use,<sup>24</sup> and the limited term of copyrights.<sup>25</sup> However, even if copyright law is not directly subject to First Amendment scrutiny, scholars and jurists have suggested that the policies behind the Speech Clause should guide courts’ decision making on certain copyright law questions.<sup>26</sup>

---

18. Lessig, *supra* note 8, at 1062.

19. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)).

20. *Id.* (quoting *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 36 (1939)).

21. *See id.* (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

22. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001).

23. *See Harper & Row*, 471 U.S. at 556 (holding that copyright laws do not violate the First Amendment because copyright protects only an author’s expression and not the author’s ideas).

24. *See Napster*, 239 F.3d at 1014, 1028 (“First Amendment concerns in copyright are allayed by the presence of the fair use doctrine,” which permits certain uses of copyrighted works based on an analysis of statutory factors including “the effect of the use upon the potential market for the work.”).

25. *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 7–12 (2001).

26. *See, e.g., Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 882 (S.D. Fla. 1978) (holding that “courts cannot permit [the Copyright Act] to sweep in an unnecessarily broad manner” so as to inhibit the free flow of information and effect a prior restraint on commercial speech), *aff’d on other grounds*, 626 F.2d 1171 (5th Cir. 1980); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1884, 1917 (2000) (copyright law’s tendency to concentrate the power “to determine the mix of speech that comprises our public discourse” militates against strengthening the rights of copyright holders); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2466 (1998) (copyright law cases must be subject to the First Amendment’s procedural and due

Two phenomena that have led to changes in copyright law that cause First Amendment concerns are globalization and technology. First, the Internet's global nature raises the specter of international piracy, especially with respect to music copyrighted in the United States.<sup>27</sup> In response to that threat, U.S. copyright holders have encouraged the federal government to join international treaties such as the Berne Convention that, under the principle of national treatment, afford U.S. copyright holders the same protection in foreign countries enjoyed by copyright holders native to those countries.<sup>28</sup> The Berne Convention, however, also incorporates the theory of moral rights:

which requires recognition of the right of an author to be named as the author of a work (the right of paternity) and the right for an author to object to uses of a work which would bring dishonor or discredit on his or her reputation (the right of integrity).<sup>29</sup>

The infusion of moral rights into U.S. copyright law raises constitutional questions because Congress's right to grant copyrights may only be exercised to promote the progress of science and art, not to protect paternity and integrity rights of authors.<sup>30</sup>

---

process safeguards as well as "independent judgment review" on appeal of determinations about copyrightable expression versus non-copyrightable ideas).

27. See NAT'L RESEARCH COUNCIL, COMPUTER SCI. AND TELECOMS. BD., THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 42 (2000) ("Sites containing illegal copies of music, for example, are quite popular and are found around the world, raising issues of jurisdiction and presenting great difficulties in enforcement."), available at <http://books.nap.edu/html/digital%5Fdilemma> [hereinafter NAT'L RESEARCH COUNCIL].

28. See INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 140 (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

29. *Id.* at 145.

30. *Id.* at 146. In the aftermath of the Ninth Circuit's decision in *Napster*, it became apparent that the theory of "moral rights," or property as personhood, had intellectual attraction: "By providing the infrastructure through which copyrighted works are shared, Napster interferes with the ability of artists to experience personhood. . . . The immoral aspect of Napster is that it strips artists of control over their copyrighted work, which is personal property." Zachary M. Garsek, *Napster Through the Scope of Property and Personhood: Leaving Artists Incomplete People*, 19 ENT. & SPORTS LAW. 1, 19 (2001). But cf. David Nimmer, Essay, *The End of Copyright*, 48 VAND. L. REV. 1385, 1414 n.177 (1995) (noting that "[t]he United States has made clear to hostile negotiating partners that U.S. copyright owners will abandon any proffered benefit in order to prevent any increased moral rights obligations . . . from becoming enforceable or even subject to toothless legal scrutiny" (internal citations omitted)).

Second, technological advances have caused copyright owners to fear that copyrights will be more easily infringed.<sup>31</sup> Digital information is more frequently copied than nondigital information; computers, for example, routinely make copies of copyrighted works to facilitate access<sup>32</sup> even for nonfringing uses. This characteristic of technology raises First Amendment concerns because free speech depends on free flow of information<sup>33</sup> and, “in the digital world, where no access is possible except by copying, complete control of copying would mean control of access as well.”<sup>34</sup> Restricted access to copyrighted digital works inhibits the “democratization of information and knowledge”<sup>35</sup> and results in a less informed public.<sup>36</sup>

*B. Creation of Right to Digitally Perform Sound Recordings*

The Copyright Act recognizes two copyrights in a song played on the radio: the copyright in the musical composition, which is usually held by the songwriter, and the copyright in the sound recording, which is usually held by the record company that employed the songwriter.<sup>37</sup> While the underlying musical composition includes a public performance right that compensates artists each time one of their songs is played on the radio, sound recordings do not include a broad public performance right, meaning that record labels do not receive compensation for each radio broadcast of a song.<sup>38</sup> Beginning in the 1920s, record companies began lobbying Congress to create a public performance right for sound recordings.<sup>39</sup> For decades, Congress rejected the lobbyists’ advances, reasoning that the sought-after remedies already existed under copyright infringement theories for the various rights then afforded copyright owners.<sup>40</sup>

31. See NAT’L RESEARCH COUNCIL, *supra* note 27, at 31 (“Rights holders may seek to control access to digital information, because access involves reproduction.”).

32. See *id.*

33. See *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (stating that in the context of commercial speech, the state law “threatens societal interests in broad access to complete and accurate commercial information that [the] First Amendment . . . is designed to safeguard”).

34. NAT’L RESEARCH COUNCIL, *supra* note 27, at 31.

35. *Id.* at 201.

36. See *id.*

37. See *Binder*, *supra* note 6, at 3–4; *Balaban*, *supra* note 6, at 252.

38. *Balaban*, *supra* note 6, at 252.

39. See H.R. REP. NO. 104-274, at 10 (1995).

40. See *id.* at 11.

*1. The Digital Performance Right in Sound Recordings Act*

Congress, in 1995, created a limited right “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”<sup>41</sup> In creating the right, however, Congress took great pains to exclude over-the-air broadcasts such as those effected by commercial radio stations. Congress was primarily concerned with preventing digital subscription<sup>42</sup> and interactive<sup>43</sup> services from benefiting without compensation to the copyright holders.<sup>44</sup> In fact, Congress clearly intended not to subject commercial broadcast radio stations to the new limited right to digitally perform a sound recording.<sup>45</sup> Thus, Congress exempted from the digital audio performance right a variety of transmissions, notably nonsubscription broadcast transmissions such as those effected by commercial radio stations licensed by the Federal Communications Commission.

*2. The Digital Millennium Copyright Act*

In 1998, Congress outlawed circumvention of technologies such as encryption and watermarking that prevent access to copyrighted

---

41. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336.

42. “A subscription transmission is one that is controlled and limited to particular recipients, and for which the recipients must pay consideration.” Balaban, *supra* note 6, at 256.

43. “Services such as audio-on-demand, pay-per-listen, and celestial jukebox transmissions are all examples of interactive services.” *Id.* at 255.

44. A House report stated:

This legislation is a narrowly crafted response to one of the concerns expressed by representatives of the recording community, namely that certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work. Subscription and interactive audio services can provide multi-channel offerings of various music formats in CD-quality recordings, commercial free and 24 hours a day.

H.R. REP. NO. 104-274, at 13.

45. The House report accompanying the bill stated:

The sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The radio industry has grown and prospered with the availability and use of prerecorded music. H.R. 1506 does not change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.

*Id.*



digital works.<sup>46</sup> The DMCA also slightly altered the DPRA's statutory licensing scheme for transmissions that did not qualify for an exemption from the digital audio transmission right.<sup>47</sup> The DMCA subjected "eligible nonsubscription transmissions" to the statutory licensing scheme, while continuing to exempt other nonsubscription broadcast transmissions. An "eligible nonsubscription transmission" was defined as:

a noninteractive nonsubscription digital audio transmission . . . that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.<sup>48</sup>

The amendment made by the DMCA appeared to have no effect on radio stations that broadcast over the Internet.<sup>49</sup> The Internet programming of broadcast radio stations seemingly does not fit within the definition of an "eligible nonsubscription transmission" because the stations seek to sell consumer products and services "other than sound recordings, live concerts, or other music-related events,"<sup>50</sup> through commercial advertisements. In maintaining the exemption for radio stations based on their non-music-related commercial messages, Congress evidently recognized that "society also may have a strong interest in the free flow of commercial information."<sup>51</sup> The Supreme Court has asserted that ensuring free flow of commercial information serves the First Amendment goal of

---

46. Balaban, *supra* note 6, at 258–59.

47. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 405, 112 Stat. 2860.

48. 17 U.S.C. § 114(j)(6) (2000).

49. The U.S. Copyright Office concluded otherwise in its published summary of the provisions of the Digital Millennium Copyright Act, where the Copyright Office stated that the Act meant to subject Internet streaming activities to the statutory license. *See* U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, at 16 (1998). This discrepancy lies at the heart of the issues discussed in the remainder of this Note.

50. 17 U.S.C. § 114(j)(6).

51. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764 (1976).

assisting the public to make informed decisions about economic matters in the free enterprise system.<sup>52</sup>

*C. Delivering Radio Content on the Internet*

With the growth of the Internet in the late 1990s, traditional broadcast radio stations began delivering their content online in an effort to reach listeners who, for example, might have a personal computer in front of them at work but no radio.<sup>53</sup> AM/FM webcasting “is the digital audio transmission of a sound recording or live performance over the Internet where no permanent copy of an audio file is created on a listener’s computer.”<sup>54</sup> Two important features of webcasting that relate to the infringement concerns of copyright holders are quality of sound and potential for copying: “the sound quality of webcasted music is generally lower than that of a CD,”<sup>55</sup> and “[a]lthough webcasting is quite similar to a radio broadcast, there is no easy way to record it digitally.”<sup>56</sup>

In contrast with AM/FM webcasting, or streaming,<sup>57</sup> certain Internet sites facilitate downloading, or “digital phonorecord delivery,” which “occurs when a user receives a complete digital audio file onto a hard drive or other media storage device.”<sup>58</sup> Like webcasting, downloading music in a compressed format like an MP3 may result in imperfect sound quality; unlike webcasting or streaming, however, download delivery creates actual copies of songs on a listener’s computer.<sup>59</sup>

III. *BONNEVILLE INTERNATIONAL CORP. V. PETERS*

*A. Facts and Procedural History*

On March 1, 2000, the Recording Industry Association of America (“RIAA”) petitioned the U.S. Copyright Office for a rulemaking to determine whether AM/FM broadcasters who

---

52. *Id.* at 764–65.

53. Horiuchi, *supra* note 3.

54. Binder, *supra* note 6, at 16.

55. *Id.* at 17.

56. *Id.* (citations omitted).

57. *Id.*

58. *Id.* at 29.

59. *Id.*

engaged in streaming were subject to the statutory licensing scheme established by the 1995 and 1998 amendments to the Copyright Act, or whether AM/FM audio streaming fell under the “nonsubscription broadcast transmission” exemption<sup>60</sup> to the digital audio performance of a sound recording right. In response to the Copyright Office’s March 16, 2000, Notice of Proposed Rulemaking, the National Association of Broadcasters (“NAB”) filed suit against RIAA seeking a declaratory judgment that AM/FM streaming was exempt from the public performance of a sound recording right in 17 U.S.C. § 106.<sup>61</sup> The Copyright Office refused to suspend its rulemaking process despite the NAB suit, and the Copyright Office’s December 11, 2000, rulemaking determined that AM/FM streaming was subject to the statutory license provisions of the Copyright Act because streaming was not exempt from the public performance of a sound recording right.<sup>62</sup> Eventually, the NAB suit was dismissed.<sup>63</sup>

In response to the rulemaking, Salt Lake City-based Bonneville International Corporation, which owns twenty radio stations from Chicago to San Francisco, and six other national radio station owners—along with the NAB—filed suit in March 2001 against the Copyright Office.<sup>64</sup> The broadcasters’ suit sought to overturn the rulemaking so that AM/FM streamers would not have to pay statutory licensing fees to record companies.

### *B. The Holding of the Eastern District of Pennsylvania*

In its *Bonneville* decision, the Eastern District of Pennsylvania determined that “Congress implicitly, if not explicitly, entrusted the Copyright Office with the task of determining which entities and means of transmission would be exempted by [17 U.S.C. §] 114 from the public performance rights of [17 U.S.C. §] 106.”<sup>65</sup> The court then stated that, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>66</sup> it was required first to determine

---

60. 17 U.S.C. § 114(d)(1)(A).

61. *See Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 770 n.9 (E.D. Pa. 2001).

62. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292, 77,293 (Dec. 11, 2000) (to be codified at 37 C.F.R. pt. 201).

63. *See Bonneville*, 153 F. Supp. 2d at 770 n.9.

64. Horiuchi, *supra* note 3.

65. *Bonneville*, 153 F. Supp. 2d at 773.

66. 467 U.S. 837 (1984).

whether Congress had directly addressed the issue before the court. If so, the court was required to honor that intent. If not, the court was “to proceed to the second part of the inquiry and determine ‘whether the agency’s answer is a reasonable one based on a permissible construction of the statute.’”<sup>67</sup>

*1. First part of Chevron inquiry*

Engaging in the first part of the *Chevron* inquiry, the court held that Congress had not directly addressed the question of whether FCC-licensed broadcasters streaming their content over the Internet were exempt from the digital audio performance of a sound recording right.<sup>68</sup> The court based its decision in this part of the inquiry on three factors: Congress’s decision not to exempt webcasting, the fact that AM/FM broadcasters who stream are not licensed to do so by the FCC, and conflicts with other sections of the statute.<sup>69</sup>

*a. Congress’s decision not to exempt webcasting.* The court remarked that “[i]t is strange that Congress would choose not to exempt webcasting, but choose to exempt AM/FM streaming, an activity that shares many characteristics with webcasting.”<sup>70</sup> Thus, the court concluded, Congress must have intended to exempt neither streaming nor webcasting from the limited public performance of a sound recording right.

Neither streaming nor webcasting are mentioned anywhere in the relevant portions of the Copyright Act.<sup>71</sup> The court apparently based its statement that webcasting was not exempted on a congressional committee’s report on the Digital Millennium Copyright Act. The committee stated that the DMCA would amend the Copyright Act “to delete two exemptions that were either the cause of confusion as to the application of the DPRA to certain nonsubscription services (especially webcasters) or which overlapped

---

67. *Bonneville*, 153 F. Supp. 2d at 773 (quoting *Chevron*, 467 U.S. at 843).

68. *Id.* at 779 (holding that “[t]he statute is either silent, or, at best, ambiguous on the issue”).

69. *Id.* at 774–79.

70. *Id.* at 775.

71. The distinction between streaming and webcasting is not at all clear. The Eastern District of Pennsylvania Court’s use of the terms interchangeably seems to preclude any suggestion by the court that webcasting and streaming are materially different. *See id.* at 779.

with other exemptions.”<sup>72</sup> However, the same report also clarified that “deletion of these two exemptions is not intended to affect the exemption for nonsubscription broadcast transmissions.”<sup>73</sup>

The court pointed out that, in connection with the DMCA, “[t]he House Manager noted that ‘services commonly known as “webcasters” have begun offering the public multiple highly-themed genre channels of sound recordings on a nonsubscription basis.’”<sup>74</sup> In this context, the term “webcasting” is used not to apply to AM/FM webcasting but rather to what has been called “Internet webcasting,”<sup>75</sup> a “Celestial Jukebox” that “require[s] a subscription or payment, [is] on-demand, or [is] interactive.”<sup>76</sup>

*b. AM/FM broadcasters who stream are not licensed to do so by the FCC.* The court accepted the argument advanced by the RIAA and the Copyright Office that nonsubscription broadcast transmissions, which are exempt from infringement of the copyright holder’s public performance of a digital sound recording right, must be made within the scope of a radio broadcaster’s FCC license. The Copyright Act defines a broadcast transmission as a “transmission made by a terrestrial broadcast station *licensed as such* by the Federal Communications Commission.”<sup>77</sup> The court interpreted the phrase “licensed as such” to require that AM/FM streamers be licensed to stream their content—an impossible prospect, since the FCC does not license such activity on the Internet—or be subject to the statutory license.<sup>78</sup>

*c. Conflicts with other sections of the statute.* The court also accepted arguments by the RIAA and Copyright Office that exempting AM/FM broadcasters from the limited public performance right would create conflicts with other sections of the Copyright Act, thus violating the canon of construction requiring that a statute should be read as a “harmonious whole.”<sup>79</sup> For

---

72. H.R. CONF. REP. NO. 105-796, at 80 (1998).

73. *Id.*

74. *Bonneville*, 153 F. Supp. 2d at 769 (quoting HOUSE COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, at 50 (Comm. Print 1998)).

75. Zerounian, *supra* note 6, at 54.

76. *Id.* (citations omitted).

77. 17 U.S.C. § 114(j)(3) (2000) (emphasis added).

78. *Bonneville*, 153 F. Supp. 2d at 776.

79. *Id.*

example, the court said that exempting AM/FM streamers would conflict with the portion of the statute that limits exempted retransmissions to those made within 150 miles of the transmitter, to local communities, or through a noncommercial, educational system.<sup>80</sup>

The court pointed to a portion of the statute that allows AM/FM broadcasters licensed by the FCC to make one ephemeral<sup>81</sup> copy of copyrighted works to facilitate transmissions within their “local service area.”<sup>82</sup> However, AM/FM streamers also must make an ephemeral copy in order to facilitate transmission over the Internet. Because the statute mentions “local service area” in connection with ephemeral copies, the court concluded that either Congress did not intend for AM/FM streaming, which can be global in nature, to be exempted from the digital audio performance of a sound recording right or that Congress failed to consider AM/FM streaming at all when it amended the Copyright Act in both 1995 and 1998.<sup>83</sup>

## *2. Second part of Chevron inquiry*

Having concluded that Congress failed to directly address the question at issue in this case—namely, whether AM/FM broadcasters who stream over the Internet are exempt from the limited sound recording right—the court then analyzed whether or not the Copyright Office reached a reasonable conclusion in its rulemaking. The court held that the Copyright Office’s reasoning—based on its reading of the statute and its consideration of policy—was reasonable.<sup>84</sup>

The court was swayed by the Copyright Office’s conclusion that the eligibility for the exemption from the public performance of a digital audio recording right should not turn exclusively on the identity of the transmitting entity.<sup>85</sup> The court also upheld the

---

80. *Id.*

81. Under 17 U.S.C. § 112(a)(1), an ephemeral copy is a copy used only to facilitate legal transmission and must be destroyed within six months.

82. *Bonneville*, 153 F. Supp. 2d at 777.

83. *Id.*

84. *Id.* at 782–83.

85. *Id.* at 783 (Copyright Office concluded that it would be unfair to exempt AM/FM streamers simply because they held FCC licenses while other webcasters without FCC licenses were not exempt).

Copyright Office's finding that AM/FM streamers should not be exempt because such a conclusion would result in economic harm to recording companies.<sup>86</sup>

#### IV. COPYRIGHT LAW AND FIRST AMENDMENT POLICY

This section analyzes the relationship between copyright and free speech in two ways. The first issue is whether the *Bonneville* court properly interpreted the statutorily expressed intention of Congress in recent amendments to the Copyright Act. Failing to recognize that "Congress has directly spoken to the precise question at issue,"<sup>87</sup> the district court allowed the Copyright Office to expand the right to digitally perform a sound recording beyond the scope necessary to serve as incentive for creation of artistic works. Second, the Note examines the potential for copyright that overzealously protects the individual rights of authors to undermine the constitutional goal of promoting artistic progress and to upset the delicate balance between copyright and free speech. A moral rights copyright law regime<sup>88</sup> may inhibit access to information<sup>89</sup> involving entertainment<sup>90</sup> and commerce<sup>91</sup> that are valuable under the policies behind the First Amendment.

##### *A. The Court Failed to Give Effect to the Intention of Congress*

The *Bonneville* court erred in the first part of its *Chevron* inquiry by determining that Congress had not directly addressed the issue of whether FCC-licensed broadcasters who streamed on the Internet were exempt from the digital performance of a sound recording right. In fact, Congress clearly had addressed the issue and had

---

86. *Id.* at 784 (The Copyright Office concluded that nonsubscription, noninteractive digital broadcasts made by an AM/FM streamer over the Internet and accessible outside the streamer's FCC-defined geographic area "are subject to the statutory license in order to compensate recording companies for the risk of lost sales due to the possibility that a listener may make a high quality unauthorized copy directly from the transmission.").

87. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

88. *See* NAT'L RESEARCH COUNCIL, *supra* note 27, at 56–57.

89. *See id.* at 201–02 (asserting that recent developments in copyright law threaten to cut off access to many copyrighted works in the digital realm).

90. *See* *Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding that neither the entertainment aspect nor the profit-making purpose of motion pictures disqualified films from First Amendment protection).

91. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764 (1976).

exempted radio broadcasters. Below, this Note argues that, “employing traditional tools of statutory construction, [the court should have] ascertain[ed] that Congress had an intention on the precise question at issue,”<sup>92</sup> and thus should have given effect to that intention.

*1. The court did not read the plain language of the statute*

*a. “Nonsubscription broadcast transmission” encompasses AM/FM streaming.* It is uncontroverted that Congress, in creating the digital audio performance of a sound recording right in 1995 and tinkering with it in 1998, intended to exempt nonsubscription broadcast transmissions.<sup>93</sup> The primary question, then, is whether AM/FM streaming constitutes a nonsubscription transmission. A nonsubscription transmission is defined in the Copyright Act as one that is “not a subscription transmission.”<sup>94</sup> A subscription transmission is defined as “a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.”<sup>95</sup>

Reading the plain language of the statute, the court should have concluded that Congress did not intend to say that radio stations make subscription transmissions. The broadcast of an AM or FM station, including one streamed on the Internet, is not limited and controlled to particular recipients but is open to any and all listeners who make the effort to tune in or log on. Also, the recipients or listeners do not directly pay or give consideration to the radio broadcaster. Rather, the broadcaster is compensated through advertisers seeking to reach the listeners with their commercial messages.<sup>96</sup> Thus, AM/FM streaming is a nonsubscription broadcast transmission.

---

92. *Chevron*, 467 U.S. at 843 n.9.

93. See H.R. REP. NO. 104-274, at 13 (1995); Balaban, *supra* note 6, at 257 (stating that “Congress . . . felt that transmissions that are on a non-subscription basis, like traditional style radio broadcasts over the internet, posed only a low risk of replacing record sales” but then noting that “the Copyright Office has since taken a somewhat contrary position”).

94. See 17 U.S.C. § 114(j)(9) (2000).

95. *Id.* § 114(j)(14).

96. See Binder, *supra* note 6, at 2 (“Radio stations broadcast popular music to draw a listener’s attention to the airtime they sell to advertisers.”).



The argument that Congress, upon adopting the DMCA in 1998, did not intend to subject AM/FM streaming to the statutory license is bolstered by examining what Congress did subject to the statutory license in 1998. At that time, Congress added “eligible nonsubscription transmission[s]”<sup>97</sup> to the list of transmissions not exempted from statutory licensing fees with regard to public performance of digital audio recordings. However, radio streaming is not an eligible nonsubscription transmission because AM/FM broadcasters who stream content over the Internet are not primarily interested in promoting “sound recordings, live concerts, or other music-related events” but instead intend to play music solely to attract listeners so they can “sell, advertise, or promote particular products or services”<sup>98</sup> through commercial advertisements.

Because AM/FM streamers clearly fall under the definition given in the Copyright Act for those who conduct nonsubscription broadcast transmissions, the court incorrectly held that Congress had not addressed the issue of whether AM/FM streaming should be exempt from the exclusive rights of copyright holders.

*b. Neither the statute nor the court articulated a material difference between webcasting and streaming.* The court put stock in the fact that it was not reasonable to assume that Congress would exempt streaming while not exempting webcasting.<sup>99</sup> The court seemed to rely on a congressional report<sup>100</sup> that at best indicates that Congress in 1998 had considered the effects of Internet webcasting, or the celestial jukebox, which is not the same as AM/FM webcasting.<sup>101</sup> The idea that Congress did not mean to exempt AM/FM webcasting is controverted in the same congressional report, which states that the DMCA did nothing to change the exemption for nonsubscription broadcast transmissions.<sup>102</sup>

The distinction between Internet webcasting and AM/FM webcasting, or streaming, militates in favor of the idea that Congress meant to exempt AM/FM webcasting but not Internet webcasting. The House Manager said that Internet webcasting involves “highly-

---

97. For the Copyright Act’s definition of such transactions, see *supra* text accompanying note 48.

98. 17 U.S.C. § 114(j)(6).

99. *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 775 (E.D. Pa. 2001).

100. See H.R. CONF. REP. NO. 105-796, at 80 (1998).

101. See Zerounian, *supra* note 6, at 54; Binder, *supra* note 6, at 16–17.

102. See H.R. CONF. REP. NO. 105-796, at 80.

themed genre channels,”<sup>103</sup> where there was perceived to be a risk of high-quality copies being made without compensation to the copyright holders. That assumption cannot be made with respect to AM/FM streaming,<sup>104</sup> where the content is not subject to the listener’s preference, and thus AM/FM streaming is unlikely to facilitate copyright infringement.

This reading of the statute is bolstered by an examination of other portions of the Copyright Act. The amendments to the Act made in 1995 and 1998 concerned themselves with the ability of listeners with access to subscription or interactive services to make their own high-quality recordings of digital transmissions for free. For example, the Act states that transmissions are not exempt from the digital audio performance right where the transmission service publishes a programming schedule in advance,<sup>105</sup> presumably because notice facilitates copying. However, commercial radio stations, including those that stream on the Internet, do not give advance notice of their programming in that way, and so concern about copying of poor sound quality<sup>106</sup> online radio broadcasts is unnecessary and was not evidently on the mind of Congress.

*c. The fact that AM/FM streamers are not “licensed as such” is irrelevant.* The court placed emphasis on the fact that the Copyright Act defines a broadcast transmission as one made by a terrestrial broadcast station “licensed as such”<sup>107</sup> by the FCC. However, the court’s reliance<sup>108</sup> on this phrase was unjustified. It is a tortured reading of the statute that suggests the throw-away phrase “licensed as such” requires AM/FM broadcasters to be subject to more stringent requirements with respect to Internet streaming than are

---

103. *Bonneville*, 153 F. Supp. 2d at 769 (quoting HOUSE COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, at 50 (Comm. Print 1998)).

104. *See* Zerounian, *supra* note 6, at 53 (noting that AM/FM streaming, or simultaneous Internet broadcasting, does not have “a playlist, skip forward function, method to influence playlists, or search engine”).

105. *See, e.g.*, 17 U.S.C. § 114(d)(2)(c)(ii) (2000).

106. *See supra* notes 55–56 and accompanying text.

107. 17 U.S.C. § 114(j)(3).

108. *Bonneville*, 153 F. Supp. 2d at 776 (“It is true that AM/FM broadcasters engaged in streaming their broadcasts over the Internet are licensed by the FCC. However, the presence of the term ‘licensed as such by the [FCC]’ suggests not only that a broadcast station is licensed by the FCC, it implies that the broadcast station is engaging in those activities which are licensed by the FCC.”).

other streamers. As has been established, Congress, in amending the Copyright Act in 1995 and 1998, was primarily concerned with the impact of subscription, interactive services,<sup>109</sup> which require consideration to be paid and which presumably facilitate copying.

Despite the phrase “licensed as such,” Congress was not concerned with the identity of those engaged in providing nonsubscription, noninteractive programming such as an online radio broadcast. The segments of the Copyright Act pertaining to the nonsubscription broadcast exemption, taken as a whole, focus not on the identity of the broadcaster—licensing by the FCC makes no difference in this context—but on the nature of the broadcasts.<sup>110</sup> Broadcasts that are not exempt include those made by services that require consideration, that control and limit the number and identity of recipients, and that do not have as their primary purpose the sale of goods and services other than music-related events. AM/FM streaming does not fit this description because it does not require consideration, it does not control and limit the number and identity of recipients, and it does have as its primary purpose the advertising and sale of goods and services other than music-related events.

*d. Congress had reason to treat retransmissions differently than AM/FM streaming.* The court also focused on the fact that retransmissions that reach listeners more than 150 miles from the site of the broadcast are not exempt from the limited sound recording public performance right in a digital audio work.<sup>111</sup> Congress could not have intended to exempt AM/FM streaming’s original transmissions while not exempting retransmissions of the same content, the court reasoned.<sup>112</sup> The court concluded that because

---

109. See 17 U.S.C. § 114(j)(14).

110. See, e.g., *id.* § 114(j)(6) (defining an eligible nonsubscription broadcast, which is not exempt, as “a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, *if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events*” (emphasis added)); *id.* § 114(j)(14) (defining a subscription transmission, which is also not exempt, as “a transmission that is *controlled and limited to particular recipients, and for which consideration is required to be paid* or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission” (emphasis added)).

111. See *id.* § 114(d)(1)(B).

112. *Bonneville*, 153 F. Supp. 2d at 776.

retransmissions are limited to the broadcaster's local service area, Congress must have intended for nonsubscription broadcast transmissions to be so limited.<sup>113</sup>

However, both the Copyright Office and the court failed to examine circumstances affecting the likelihood of reproduction, a key factor that distinguishes nonsubscription broadcast transmissions from retransmissions. This failure on the part of the Copyright Office and the court is notable since factors affecting the likelihood of reproduction were clearly examined in other contexts.<sup>114</sup> In singling out retransmissions, Congress likely was concerned about the ability of listeners to copy content because, having heard the content once already, listeners could anticipate programming. With an original broadcast, however, the order of programming content has not been previously disclosed. Thus, Congress apparently concluded that original, nonsubscription broadcast transmissions such as AM/FM streaming did not facilitate copying and therefore should be exempt from the public performance right.

*e. The court's focus on ephemeral copies is misplaced.* The Copyright Act allows broadcast radio stations to make one ephemeral copy of a copyrighted work to facilitate a broadcast in the stations' local service areas.<sup>115</sup> However, the Act does not provide for the use of an ephemeral copy to facilitate AM/FM streaming, which may be global in nature depending on the listeners who opt to log on. The court reasoned that this discrepancy supports the proposition that Congress failed to consider AM/FM streaming and so the statute is ambiguous.<sup>116</sup>

This minor apparent oversight on the part of Congress does not necessarily support that conclusion, however.<sup>117</sup> The court here

---

113. *Id.*

114. *See supra* notes 104–05 and accompanying text.

115. *Bonneville*, 153 F. Supp. 2d at 777.

116. *Id.*

117. Two bills proposed in Congress after Judge Schiller's decision in *Bonneville* would make the court's discussion of the ephemeral copy issue moot. The proposed Music Online Competition Act of 2001, introduced in the House of Representatives August 2, 2001, would amend 17 U.S.C. § 112 to exempt from copyright infringement liability the making of multiple ephemeral copies by an entity, such as a broadcast radio station streaming on the Internet, that is entitled to broadcast a digital sound recording to the public on a nonsubscription basis. *See* Music Online Competition Act of 2001, H.R. 2724, 107th Cong. § 3(b) (2001). Similarly, the proposed Internet Radio Fairness Act would exempt from copyright infringement liability the making of multiple ephemeral copies by a broadcast radio station transmitting on a nonsubscription basis on the Internet. *See* Internet Radio Fairness

became overly focused on “copies”<sup>118</sup> as predictors of infringement. This focus on “copies” as predictors of infringement is misplaced for two reasons. First, copyright infringement no longer depends wholly on reproduction as it once did.<sup>119</sup> Second, technologically advanced devices—especially computers—now regularly make copies of copyrighted works simply to provide access<sup>120</sup> for noninfringing uses. An overly intense focus on preventing reproduction of copyrighted works would give copyright owners more rights in the online world than in the paper world—and more rights than Congress intended.<sup>121</sup> Control of reproduction is not the goal of copyright law but simply a mechanism to achieve the goal of promoting knowledge by providing an incentive for authors and scientists to produce creative or scientific works.

---

Act, H.R. 5285, 107th Cong. § 5(a) (2002). The latter proposal clarifies that making multiple ephemeral copies should not subject the radio station streaming on the Internet to the statutory license ordered by Judge Schiller in *Bonneville*. See *id.* § 5.

118. *Bonneville*, 153 F. Supp. 2d at 782–83.

119. See JESSICA LITMAN, DIGITAL COPYRIGHT 177 (2001) (“The right to make copies . . . is not fundamental to copyright in any sense other than the historical one. When the old copyright laws fixed on reproduction as the compensable (or actionable) unit, it was not because there is something fundamentally invasive of an author’s rights about making a copy of something. Rather, it was because, at the time, copies were easy to find and easy to count, so they were a useful benchmark for deciding when a copyright owner’s rights had been unlawfully invaded.”).

120. See *id.* at 178 (“Today, making digital reproductions is an unavoidable incident of reading, viewing, listening to, learning from, sharing, improving, and reusing works embodied in digital media. The centrality of copying to use of digital technology is precisely why reproduction is no longer an appropriate way to measure infringement.”); see also NAT’L RESEARCH COUNCIL, *supra* note 27, at 140 (“[S]o many noninfringing copies are routinely made in using a computer that the act has lost much of its predictive power: Noting that a copy has been made tells far less about the legitimacy of the behavior than it does in the hard-copy world.”).

121. LITMAN, *supra* note 119, at 178 (“[C]ontrol over reproduction could potentially allow copyright owners control over every use of digital technology in connection with their protected works. This is not what the Congresses in 1790, 1870, 1909, and 1976 meant to accomplish when they awarded copyright owners exclusive reproduction rights.”). The proposed Music Online Competition Act of 2001, introduced in the House of Representatives August 2, 2001, would exempt from copyright infringement liability the making of a digital copy of a sound recording by a computer or other device as long as the use of that sound recording was otherwise lawful. See Music Online Competition Act of 2001, H.R. 2724, 107th Cong. § 6(b) (2001).

*2. The reasonableness of the Copyright Office's reading of the statute*

Under *Chevron*, a court that has determined that Congress did not clearly express its intention must then examine “whether the agency’s answer is based on a permissible construction of the statute.”<sup>122</sup> This deferential standard<sup>123</sup> may be satisfied in *Bonneville* if Congress indeed failed to express its intention with respect to AM/FM webcasting. However, the reasonableness of the Copyright Office’s construction of the sound recording performance right in the online context is called into question by the court’s unsupported empirical assumption<sup>124</sup> about the potential for online radio broadcasts to harm record sales.

In the case of traditional, non-Internet AM/FM broadcasts, it has long been recognized that playing copyrighted sound recordings over the air ultimately pays off for both songwriters and record companies: “[T]he sale of many sound recordings and careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting.”<sup>125</sup> Even today in the traditional broadcast context, radio stations do not pay record labels for the right to broadcast sound recordings because the Copyright Act does not grant public performance rights in that context.<sup>126</sup> Despite an argument by the radio broadcasters that online broadcasts, like over-the-air broadcasts, would benefit copyright holders through increased sales,<sup>127</sup> the *Bonneville* court did not

122. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

123. *Id.* at 843 n.11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”).

124. “The global nature and the enhanced quality of the transmissions increase the likelihood that record sales could be affected by the streaming of AM/FM broadcasts.” *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 778 (E.D. Pa. 2001).

125. *Id.* (quoting S. REP. NO. 104-128, at 16 (1995)); see also Balaban, *supra* note 6, at 253 (“[B]ecause recording artists will receive compensation from increased album sales, the radio stations argue that they should not have to further compensate recording artists by paying for a performance right to broadcast music.”).

126. Binder, *supra* note 6, at 5 (“[A] sound recording lacks the right of public performance under most circumstances.”); *Bonneville*, 153 F. Supp. 2d at 778 (AM/FM “broadcasters traditionally have not been subject to any public performance right for using a recording in an AM/FM broadcast.”).

127. “The Broadcasters claimed that just as radio broadcasts on a local scale benefit the recording industry through the promotion of sales, that same broadcasting activity is even

require the Copyright Office to provide evidence that AM/FM webcasting would harm sales.

In fact, there is credible evidence that AM/FM streaming benefits sound recording copyright holders: “The economics of AM/FM Radio Webcasting work the same way as they do for over-the-air broadcasting, a symbiotic relationship between the record companies and the radio stations who ‘promote these songs to 75 percent of Americans who listen to the radio each day.’”<sup>128</sup> Evidence of online broadcasting’s beneficial impact for copyright holders is not contradicted by the fact that the broadcasts are digital because streaming, unlike downloading into a format such as MP3, does not involve creation and storage of a permanent digital audio file on a radio listener’s computer.<sup>129</sup> Because “AM/FM Radio Webcasts are not likely to be copied”<sup>130</sup> and because such webcasts “are not ‘interactive’ or available ‘on demand,’”<sup>131</sup> the only economic impact of streaming for copyright holders is likely to be a positive one.

*B. Policy Militates in Favor of Free Speech in  
Close Copyright Law Questions*

Fundamental changes in the Copyright Act in the last quarter-century have led to calls for application of First Amendment principles to copyright.<sup>132</sup> Globalization caused U.S. adoption of

---

more beneficial to the recording industry on a global scale due to the greater public exposure.” *Bonneville*, 153 F. Supp. at 783 (citation omitted).

128. Zerounian, *supra* note 6, at 69 (quoting *Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. 140 (2000) (statement of Edward O. Fritts, President, National Association of Broadcasters)).

129. Binder, *supra* note 6, at 16–17, 29 (“[S]treaming technology makes the data . . . difficult to copy . . .”).

130. Zerounian, *supra* note 6, at 68.

131. *Id.* at 66.

132. See *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 882, 882 (S.D. Fla. 1978) (“[W]hen they operate at cross-purposes, the primacy of the First Amendment mandates that the Copyright Act be deprived of effectuation.”), *aff’d on other grounds*, 626 F.2d 1171 (5th Cir. 1980); Netanel, *supra* note 25, at 85–86 (“[D]evelopments in copyright and First Amendment doctrine have rendered the judicial immunization a peculiar and pernicious anomaly. . . . It is high time for courts to apply appropriate First Amendment scrutiny . . . .”); C. Edwin Baker, Essay, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 951 (2002) (arguing that because of the speech and press clauses in the First Amendment, “copyright generally [should not] be applied to limit noncommercial copying”).

international treaties<sup>133</sup> that focus on the “moral rights” of authors rather than the shared goal of the Copyright Clause and the First Amendment—“ensur[ing] that our society will continue to receive vital contributions from individuals who otherwise might be discouraged from doing so.”<sup>134</sup> Technology has led to the adoption of laws like the Digital Millennium Copyright Act, which prohibits circumvention of technological measures designed to block access to copyrighted works even for noninfringing uses<sup>135</sup> of those works. Congress’s willingness to continually respond to copyright holders’ calls for increased statutory rights<sup>136</sup> results in compensation of authors that is unrelated to the constitutional purpose of copyright—to promote the progress of science and art.<sup>137</sup>

Given those changes in the Copyright Act, the potential exists for copyright law, as it moves from promoting progress to rewarding authors, not only to undercut its own ability to promote progress but also to unnecessarily restrict free speech. Copyright holders who are allowed to severely restrict access to their works due to concerns about copying prevent future authors from building on what has already been done and creating their own new works.<sup>138</sup> Such a result contradicts the constitutional purpose of copyright law. That result also contradicts the First Amendment policy favoring the protection of access to information in order to guarantee free speech. Artistic and commercial expression,<sup>139</sup> like political speech,<sup>140</sup> facilitate self-

---

133. See *supra* notes 28–30 and accompanying text.

134. *Triangle Publ’ns*, 445 F. Supp. at 882. But cf. Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 23 (2002) (“The policy objective of copyright—the establishment of ex ante incentives maximally stimulating production of profitable work—is not the First Amendment’s objective.”).

135. See *supra* note 120 and accompanying text.

136. See Lessig, *supra* note 8, at 1065 (criticizing Congress’s move, in the Sonny Bono Copyright Term Extension Act of 1998, to lengthen the copyright’s term to the life of the author plus seventy years).

137. See David G. Savage, *Lining Up the Next Term*, A.B.A. J., Sept. 2002, at 34 (discussing that in context of U.S. Supreme Court cases over constitutionality of extending copyright terms for Mickey Mouse and other Hollywood creations, scholars assert that compensation of authors is not necessary to provide an incentive for societal progress when the works have already been created, especially when the authors are dead).

138. See NAT’L RESEARCH COUNCIL, *supra* note 27, at 201–02 (asserting that public access to copyrighted works “encourag[es] the creation of new knowledge and new works”).

139. See Rubenfeld, *supra* note 134, at 39 (arguing that the core protection of the First Amendment—that in America no one can be punished for daring to conceive or to express an unauthorized idea—must guarantee that copyright law does not abridge “freedom of imagination” even in the contexts of artistic speech and commercial speech).



actualization,<sup>141</sup> contribute to democracy,<sup>142</sup> enable the free enterprise system,<sup>143</sup> and aid the search for truth.<sup>144</sup>

In *Bonneville*, the court's decision to uphold the Copyright Office's mistaken interpretation of congressional intent resulted in an effective prior restraint<sup>145</sup> of commercial speech<sup>146</sup> of radio broadcasters and their advertisers. AM/FM webcasting had been protected by Congress in the DPRA and DMCA when the exemption from the statutory licensing scheme for nonsubscription broadcast transmissions was created and perpetuated.<sup>147</sup> Even if that exemption was not clear to the *Bonneville* court, the court should have given the benefit of the doubt in a close copyright case to a statutory reading that remained faithful to the constitutional purpose of copyright and favored the free flow of information. The *Bonneville* court, however, prohibited radio broadcasters from doing online what they can do over the air—broadcast copyrighted sound recordings without paying a licensing fee—even though the policy reasons that justify government regulation of radio are not present in the Internet context.<sup>148</sup>

---

140. See *id.* at 14–15.

141. See GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 13–15 (1999) (citation omitted).

142. See *id.* at 10–13.

143. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764 (1976).

144. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

145. See Rubinfeld, *supra* note 134, at 6 (“[N]o First Amendment principle runs deeper than the bar against prior restraints . . . . Yet in copyright cases . . . courts issue prior restraints . . . all the time.”).

146. Although only the advertisements and not the copyrighted sound recordings on AM/FM webcasts could arguably be called commercial speech, it is instructive to consider what the policy behind the Supreme Court's commercial speech doctrine contributes to this discussion. Were it not for the Copyright Act, AM/FM streaming could be regulated only if “the regulation directly advances the governmental interest asserted, and [if] it is not more extensive than is necessary to serve that interest.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

147. See 17 U.S.C. § 114(j)(9) (2000); *id.* § 114(j)(6) (2000).

148. See *supra* notes 1–2 and accompanying text.

## V. CONCLUSION

The Eastern District of Pennsylvania engaged in flawed statutory interpretation and made unsupported empirical claims about economic harm. In doing so, the court demonstrated that misplaced fears about the impact of technology and globalization on copyrighted works subtly threaten to further change the focus of U.S. copyright law from promoting progress to rewarding authors. The transformation of copyright by courts under the influence of globalization and technology poses a particular danger with respect to the Internet because an undue focus on the rights of copyright holders places restrictions on access to information and inhibits speech. When faced with close questions regarding the extent of copyright, courts should not favor moral rights over free speech. If they do, both the Copyright Clause and the First Amendment will suffer.

*Edward L. Carter*

